

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-207134**DATE:** February 11, 1983**MATTER OF:** Judge Gerard L. Goettel

DIGEST: In order to authorize a refund from the Judicial Survivors' Annuity Fund, other than for absolute retirement, there must be an express statutory provision. The Act of December 5, 1980, Pub. L. No. 96-504, Section 2, 94 Stat. 2741 (amending 5 U.S.C. 8344 (1976)), provides a legal mechanism to allow certain judicial officials the opportunity to reinvest into the civil service retirement plan within a set time. It does not authorize the refund of monies from the Judicial Survivors' Annuity Fund.

The Director of the Administrative Office of the United States Courts has requested an opinion on whether the Honorable Gerard L. Goettel, District Judge, Southern District of New York, is entitled to withdraw funds from the Judicial Survivors' Annuity Fund (established by the Judicial Survivors' Annuity Reform Act, Pub. L. No. 94-554, Section 3, 90 Stat. 2603 (1976)). Judge Goettel seeks to have the monies he originally deposited into the Judicial Fund returned. This deposit gave him credit for his prior Government service in the Judicial Survivors' Annuity System. He wants to withdraw those funds and use them to reestablish his entitlement to a civil service annuity as authorized under the Act of December 5, 1980, Pub. L. No. 96-504, 94 Stat. 2741, which added 5 U.S.C. 8344(f) and (g) (Supp. IV, 1980) to the civil service retirement provisions. The Director's office has tentatively denied Judge Goettel's request. We agree because we cannot authorize a release of funds from the Judicial Survivors' Annuity System without statutory authority.

BACKGROUND

Judge Goettel elected coverage under the Judicial Survivors' Annuity Reform Act, 28 U.S.C. 376 (1976),

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upon his appointment as a judge in 1976. At the time of his appointment a judge's eligibility for a civil service retirement annuity was doubtful. Owing to this, Judge Goettel applied for and received a lump-sum refund of his civil service retirement contributions voiding his entitlement to a deferred civil service annuity. 5 U.S.C. 8342(a) (1976). Judge Goettel used the refund to make necessary deposits under the provision in the Judicial Survivors' Annuity System allowing him credit for years of prior Government service under those provisions. 28 U.S.C. 376(d)(2), (k)(4) (1976).

Congress subsequently passed the Act of December 5, 1980, cited above, clarifying the rights of judicial officials to receive civil service retirement annuities. The Act provides for the discontinuance of civil service annuity payments to a justice or judge in active service if appointed on or after the effective date of the act. 5 U.S.C. 8344(f) (Supp. IV, 1980). It also provides that a former Government worker employed as a justice or judge may apply for a lump-sum refund from the civil service retirement fund at any time prior to resignation or retirement from active judicial service. 5 U.S.C. 8344(g) (Supp. IV, 1980). In addition, because of the prior confusion surrounding the question of eligibility, the Act provides a 1-year grace period allowing justices and judges who had withdrawn their credits from the civil service system to redeposit the amount of money involved with the Office of Personnel Management, thereby reestablishing their title to annuity payments. Section 2, Pub. L. No. 96-504, supra.

Judge Goettel says that in order to take advantage of the Act's relief provision, he must receive a refund from the Judicial Survivors' Annuity System. He bases his claim to a refund on a common-law theory of mutual mistake; arguing that his deposit into the judicial plan resulted from his withdrawal from the civil service retirement plan and that he sought that refund on the basis of erroneous information provided by the Office of Personnel Management.

DISCUSSION

We find that Judge Goettel's entitlement to a refund from the Judicial Survivors' Annuity Fund may not be predicated on a mutual mistake theory but must be based either on a statutory provision in the Judicial

Survivors' Annuity Reform Act allowing a release of funds or on a clear implication in the Act of December 5, 1980, that such a refund is authorized.

The misinformation Judge Goettel claims as the basis of a mutual mistake concerned his entitlement to a deferred civil service annuity. We recognize that the right of a judge to receive a civil service retirement annuity predicated upon prior service was not at all clear when Judge Goettel was appointed. His conclusion that he would not be covered by the civil service retirement system may well have influenced his decision to exercise his right to deposit into the Judicial Survivors' Annuity Fund. The courts under their equity jurisdiction will grant relief in some circumstances when both parties to a transaction were mistaken as to the effect of their action or agreement. However, we found no basis in those principles to permit withdrawal of the deposit to the Judicial Survivors' Annuity Fund predicated on the misunderstanding of the judge's eligibility for retirement benefits from the civil service retirement fund. See generally 30 C.J.S. Equity §§ 44-47; 54 Am. Jur. 2d, Mistake, Accident, or Surprise. We note particularly that as noted below Judge Goettel stands to benefit from the deposit to the Judicial Survivors' Annuity Fund.

The Judicial Survivors' Annuity Reform Act provides for a refund of amounts paid in only when a judicial official "resigns" from office, without receiving any "retirement salary" (prior to or at age 65 without at least 15 years of service or prior to or at age 70 without at least 10 years of service). 28 U.S.C. 376(g) (1976). Furthermore, there are no provisions for transfer of money between funds, nor are there any "opt out" mechanisms in the judicial plan. Therefore, we find no authority within that Act permitting a refund of the money Judge Goettel deposited.

We also do not find that the Act of December 5, 1980, Pub. L. No. 96-504, cited above, provides the necessary authority. Section 2 of the Act states:

"SEC. 2. A present or former justice or judge of the United States, as defined by section 451 of title 28, United States Code, who, prior to the effective date of this section, voided his right to receive an annuity under subchapter III of chapter 83 of title 5, United States Code, by applying for and receiving a refund of his lump-sum credit while serving as such as justice or judge may, upon application filed with the Office of Personnel Management within one year following the effective date of this section, redeposit such refund with interest computed under section 8334(e) of such title 5 and thereby reestablish his right to receive an annuity under such subchapter effective on the date he otherwise was eligible to receive an annuity. The surviving spouse of any such justice or judge who dies before the effective date of this section may apply to make such redeposit within one year following the effective date of this section and receive both (1) the amount of the annuity and (2) any survivor annuity the justice or judge could have provided under the provisions of law in effect at the time of separation from the service on which title to the annuity is based."

As a remedial provision Section 2 is to be given a liberal interpretation. J. Sutherland, Statutes and Statutory Construction, section 60.1 (4th ed., C. Dallas Sands, 1973). However, any interpretation must be consistent with the statute's plain language and the intent of Congress as disclosed by the section's legislative history. See 52 Comp. Gen. 412 (1973). On its face, Section 2 does not provide a statutory mechanism for a release of money from the Judicial Survivors' Annuity Fund. It only provides for the Office of Personnel Management to allow redeposit into the civil service retirement system. Moreover, there is no indication in the legislative history that such was the specific intent of Congress concerning this provision. S. Rep. No. 96-905, 96th Cong., 2d Sess. (1980); H. Rep. No. 96-467 (I, II), 96th Cong., 1st Sess. (1979).

Congress was aware that approximately 70 judges had withdrawn from the civil service retirement system upon

their appointment and that these withdrawals might have been based on incorrect legal advice. Section 2 was intended to rectify this by providing the legal mechanism to permit these judges an opportunity to reinvest into the civil service retirement system. Congress did not enact a special provision to permit withdrawal from the Judicial Survivors' Annuity Provisions. We cannot extend the provision beyond what Congress provided.

While we recognize that the release of funds from the Judicial Survivors' Annuity System would be compatible with the rights conferred by Section 2 of the Act and that it might be advantageous to some of the judges involved, we cannot substantively add to the legislation. Further, we cannot imply a modification of the Judicial Survivors' Annuity Reform Act merely out of a supposed legislative intent. An imputed intent must be manifestly clear from the intent of the legislation and be practically indispensable and essential to that provision's goals. Purdy v. United States, 146 Fed. Supp. 762 (D. Alaska, 1956); J. Sutherland, Statutes and Statutory Construction, supra, § 5503.

Moreover, the congressional purpose of providing a legal mechanism to allow redeposit into the civil service retirement plan is not thwarted if funds are not released from the Judicial Survivors' Annuity System since Judge Goettel is permitted to reinvest in civil service without withdrawing from the Judicial Survivors' Annuity Plan. The Judicial Survivors' Annuity Reform Act does not prohibit an individual from crediting his prior civil service time into the calculation of the survivors' annuity even though the years used are also covered under the civil service retirement plan. 28 U.S.C. 376(k)(4) (1976).

The judicial plan does restrict the annuitant's survivor from receiving more than one annuity based on the same credit years. 28 U.S.C. 376(r) (1976). To avoid the resulting reduction in benefits to his survivor, a judge may decline survivor protection under the civil service retirement system. 5 U.S.C. 8341(6)(1) (1976). In this way, a judge would receive his full retirement annuity from civil service and his survivors' annuity from the judicial plan would not be diminished.

Accordingly, we find that Judge Goettel's request must be denied. Neither the Judicial Survivors' Annuity

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Reform Act, 28 U.S.C. 376 (1976), nor the Act of December 5, 1980, Pub. L. No. 96-504, 94 Stat. 2741 (1980), provide the necessary statutory authority for a release of the funds in question.

for Milton F. Jowles
Comptroller General
of the United States